Allied Stores Corporation d/b/a The Bon Marche *and* United Food and Commercial Workers Union, Local No. 367. Cases 19–CA–20829, 19–CA–21154, 19–CA–21211–1 and 2, and 19–RC–12155

August 11, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 28, 1991, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees,[1] by creating the impression that employees' union activities were under surveillance, by promulgating and enforcing an unlawful bulletin board policy prohibiting the posting of union-related material, and by reprimanding[2] and issuing a written warning to employee Holly Kelley. Although we also agree with the judge that the Respondent unlawfully discharged Kelley,[3] for the reasons set forth below we reverse his finding that the Respondent further violated Section 8(a)(3) by failing to provide Kelley with additional hours as a rover at the Respondent's department store. Finally, as discussed fully below, we affirm the judge's recommendation that the unfair labor practices the Respondent committed during the critical period were sufficient to warrant setting aside the election in the representation case.

1. The evidence shows that during the election campaign Kelley worked as an hourly employee in the cash office of the Respondent's department store. On March 16, 1990,[4] the Respondent's store personnel manager, Sharon Hartmann, informed Kelley that the Respondent was reducing her hours because another employee in her department with greater seniority had requested additional hours of work. No exceptions were filed to the judge's finding that the Respondent's action did not violate the Act. During this conversation, Kelley asked Hartmann if she could work additional hours as a ''rover,'' which is a sales associate who floats from department to department within the Respondent's store. Although there is an unresolved conflict between Kelley's and Hartmann's testimony as to the response that Hartmann made, they agree that Hartmann generally said that the Respondent would attempt to accommodate Kelley's request. Thereafter, according to the varying testimony that Kelley gave, Kelley worked between 1 and 10 shifts as a rover from March until July when she resumed working about 40 hours per week in the cash office.

The judge found that the Respondent afforded Kelley, a known union adherent, discriminatory treatment by failing to give her additional hours as a rover. Because the evidence showed that during the period Kelley was seeking additional hours the Respondent hired between 5 and 12 new employees to work part-time as rovers on its sales floor, the judge found that the Respondent had not treated Kelley in accordance with its admitted policy of giving its more senior employees a scheduling preference. He also relied on evidence that a department supervisor had told Kelley in May, while she was working as a rover, that management was reluctant to assign her more hours in that capacity because it feared that, in light of her cash office experience, she would ''count down'' (steal money from) the sales registers. The judge stressed that the Respondent presented no evidence to substantiate that suspicion. Thus, based on the conflicting reasons he found that the Respondent offered to justify its failure to assign Kelley additional hours and the evidence that

[1] We find that the totality of the evidence here supports the judge's findings that the Respondent coercively interrogated employee Holly Kelley in violation of Sec. 8(a)(1) of the Act. We particularly note that the evidence shows a pattern of interrogations involving Kelley, that Kelley was not a known union adherent at the time they occurred, and that these interrogations did not occur in a context free from other unfair labor practices.

[2] The judge stated in his decision that Store Managers Tom Goodman and John Doll, Store Operations Manager Julie Stengem, and Laura King, Kelley's immediate supervisor at the time, were present when the Respondent unlawfully reprimanded Kelley for certain remarks she made to another employee. Although the record shows that Stengem and King were the only supervisors who attended that meeting, our correction of this misstatement does not affect the judge's conclusion that the Respondent's conduct violated the Act.

[3] In finding that Kelley's discharge violated the Act, we do not rely on the the 10th paragraph of the judge's ''Analysis and Conclusions'' in which he concluded ''[i]t is significant that the written warning which Hartmann gave to Kelley on July 28 was unlike other warnings that Hartmann had previously issued to other employees.''

Additionally, the judge stated in his decision that the Respondent has an alarm system that protects the cash office where Kelley worked. The record shows, however, that the security system the judge was referring to covers only the cash vault within that office. Although it is clear that the alarm protecting the vault would not cover the cash drawer where, in some instances, Kelley and other employees inadvertently left the Respondent's money at the end of their shifts, we note Kelley's testimony that it was her understanding that the Respondent had another alarm system which protected the entrances to its facility. In any event, we agree with the judge that Kelley's union activity and not her failure to remove money from the cash drawer was the motivating factor in the Respondent's decision to discharge her.

[4] All dates are in 1990 unless otherwise noted.

there was additional work available which newly hired employees were performing, the judge found that the Respondent discriminated against Kelley in the assignment of rover hours.

Contrary to the judge, we do not find that the Respondent's failure to assign Kelley more rover hours violated the Act. There is no evidence here that the Respondent has a practice of assigning an employee rover hours to compensate for any reduction in hours worked within the employee's own department. Although the judge stressed that the Respondent departed from its seniority policy in hiring new rover employees while Kelley was working reduced hours, we note the lack of evidence showing that the Respondent's seniority policy applied beyond departmental lines. The record also fails to establish that the Respondent refused to assign Kelley rover hours when she requested them following her March 16 conversation with Hartmann. Indeed, according to Kelley's own testimony, the Respondent assigned her to work a shift as a rover in the only instance that she called the Respondent specifically requesting that work. Furthermore, Kelley admitted that she may have received as many as 10 rover shift assignments, and this is not clearly incompatible with Hartmann's vague promise that Kelley could possibly be allowed to pick up extra hours as a rover. Finally, we conclude that the low-level supervisor's statement to Kelley suggesting that management questioned her integrity provides no basis for finding discrimination here in the absence of a link between that degrading comment and Kelley's union activity. Therefore, although we agree with the judge that the Respondent has discriminated against Kelley in other respects, we do not find that there is sufficient evidence here to establish that the Respondent violated the Act by failing to assign Kelley additional hours of work.[5]

2. We have found that during the critical period the Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing an unlawful policy restricting the use of its lunchroom bulletin board and by Store Manager Tom Goodman's coercive interrogation of employee Kelley.[6] Regarding the Respondent's bulletin board policy, the evidence shows that before the advent of the Union the Respondent permitted its employees to use the bulletin board to advertise personal items for sale and for other announcements. After the organizing campaign began, the Respondent prohibited employees from posting any literature that was unrelated to their work. Goodman told employees during a meeting that ''this was his house, and . . . you cannot put anything you want up [on the bulletin board]; you have to have our permission.'' Employee Kerry M. Kinville gave uncontroverted testimony that on two occasions during the campaign she observed management officials removing prounion literature she had posted on the lunchroom bulletin board. The Respondent's change in policy violated Section 8(a)(1) as the judge found and clearly affected the entire bargaining unit that the Union sought to represent.[7]

The Respondent has argued, citing *Heartland of Keyser*, 275 NLRB 168 (1985), that conduct of this nature without more is insufficient to justify setting aside the election. In rejecting the Respondent's contention, we note that *Heartland of Keyser* involved a new employer which, in the absence of disparate enforcement, was free to set its own policies about the use of its bulletin boards and that about 3 weeks before the election there the employer began allowing all literature to be posted on its bulletin board for a reasonable period of time. Thus, *Heartland of Keyser* did not involve an employer which, as here, was found to have changed its bulletin board policy in response to the union organizing campaign. Furthermore, unlike the employer there, the Respondent has engaged in other conduct that may have interfered with the election results. We stress in this regard that the Respondent's store manager, who was its highest ranking official at the facility, interrogated employee Kelley about her union activities and, as the judge found, during this conversation, ''by obvious implication, made it clear to her that a promotion to a managerial position [Kelley was seeking] would be more likely in the event she elected to oppose the union.''[8]

[5] Because of our disposition of this issue, we find it unnecessary to reach the Respondent's contention that the complaint was not sufficiently broad to cover the violation that the judge found.

[6] The Respondent's other unfair labor practices occurred either before the Union filed the representation petition or subsequent to the May 18, 1990 election. Further, although Goodman's interrogation of Kelley occurred on March 7, 1990, which was the same day that the Union filed the instant petition, we note that the Respondent has failed to establish here that its unlawful conduct preceded the filing of the petition.

[7] Contrary to our dissenting colleague, we do not find that the Petitioner's alleged ability to communicate with the eligible voters during the election campaign has a significant bearing on whether the Respondent's elimination of unfettered access to its bulletin board tainted the election. We conclude that the Respondent's modification of its bulletin board policy had a coercive impact on the election results in part because it deprived the unit employees of a benefit they enjoyed before the organizing campaign began and necessarily hindered communications between the voters themselves during the critical period.

[8] Other cases cited by the Respondent in this connection are also clearly distinguishable. In *McIndustries, Inc*., 224 NLRB 1298, 1301–1304 (1976), the sole critical period violation was a supervisor's statement on one occasion to union handbillers that they should move several feet back (off company property) while distributing handbills; one handbiller actually did so while the others remained in place. In *Accurate Products*, 170 NLRB 1517, 1524 (1968), the Board adopted a finding that an overbroad no-solicitation/no-distribution rule was not objectionable because it had been on the books for 8 years, had not been protested by the union during three previous elections, and was not in fact forced. (The election was, however, set aside on other grounds. Id. at 1526.) In

Continued

Contrary to the Respondent, we also find that the present case is distinguishable from *Clark Equipment Co*., 278 NLRB 498 (1986), in which the Board found that certain isolated 8(a)(1) violations in a unit of more than 800 employees did not warrant setting aside the election. Id. at 505. The Board also noted, as to the interference with the distribution of union literature in that case, that the fact that the interference was ''momentary only'' was ''relevant'' to the question whether the election should be set aside. Id. Here, the Respondent engaged in two violations of Section 8(a)(1) in a much smaller unit and the unlawful change in its bulletin board policy, as stated, affected all the unit employees. For these reasons, we conclude that this is not a case in which ''it is virtually impossible to conclude that the misconduct could have affected the election results.''[9] Thus, we find it appropriate here to apply our usual policy, set out in *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962), of directing a new election when an unfair labor practice has been committed during the critical period.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 4.

''4. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employee Kelley on September 16.''

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[10]

We shall order the Respondent to offer Holly Kelley immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings or other benefits she may have suffered by reason of the unlawful discharge in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to Kelley's unlawful reprimand, written warning, and discharge and to notify her that this has been done and that these unlawful actions will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Allied Stores Corporation d/b/a The Bon Marche, Olympia, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union activity, creating the impression of surveillance of employees' union activity, and promulgating and enforcing an unlawful bulletin board policy that prohibits the posting of union-related material.

(b) Reprimanding and issuing written warnings to employees in reprisal for their union activity.

(c) Discharging employees because of their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Holly Kelley immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to Kelley's unlawful reprimand, written warning, and discharge and notify her in writing that this has been done and that these unlawful actions will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the Order.

G & H Towing Co., 168 NLRB 589 (1967), the only critical period interference with solicitation was a refusal to allow a particular Teamsters organizer to engage in off-duty, on-premises solicitation; the Board noted that Teamsters literature was freely posted on the bulletin boards. Id. at 592. The only other critical period misconduct was a somewhat ambiguous threat by a supervisor supporting one of two competing unions made to a supervisor supporting the other union, in the presence of employees, and an instance of picket line misconduct by one union that occurred away from the polling place after most of the votes had been cast. Finally, *Perth Amboy Hospital*, 279 NLRB 52 (1986), has no precedential significance at all regarding the point on which the Respondent cites it. Only the respondent employer filed exceptions in that case, and the Board's adoption of the judge's recommendations concerning the election was therefore merely ''pro forma.'' Id. at 52 fn. 3.

[9] *Clark Equipment*, supra at 505.

[10] The judge recommended that a broad cease-and-desist order issue against the Respondent. However, we have considered this case in light of the standard set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist order is appropriate. We shall modify the judge's recommended Order accordingly.

(d) Post at its facility in Olympia, Washington, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on May 18, 1990, in Case 19–RC–12155, is set aside and that this case is severed and remanded to the Regional Director for Region 19 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

MEMBER OVIATT, dissenting in part.

I would not set aside the election which the Union lost by more than a two-to-one margin. The majority does so based on the Employer's withdrawal of a benefit by limiting its lunchroom bulletin board to work-related items, and on a single interrogation. The Petitioner, however, could, and did, easily communicate with the employees through its access to them in the store itself, as well as in mall areas adjacent to the store. The Petitioner's organizing campaign appears to have been a sophisticated one that included the distribution of a campaign videotape to all eligible voters. The restriction on use of the bulletin board is thus unlikely to have had any meaningful effect on the employees' votes. The restriction, in my view, does not warrant setting aside the overwhelming rejection of the Union even when coupled with the one unlawful interrogation. That interrogation occurred some 2-1/2 months prior to the election, there is no showing of dissemination, and there were no other untoward incidents during the critical period. Accordingly, I would not set the election aside.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees regarding their union activity, create the impression of surveillance of our employees' union activity, and promulgate and enforce an unlawful bulletin board policy that prohibits the posting of union-related material.

WE WILL NOT reprimand and issue written warnings to our employees in reprisal for their union activity.

WE WILL NOT discharge our employees because they engage in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL offer employee Holly Kelley immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her, with interest.

WE WILL remove from our files any references to Kelley's unlawful reprimand, written warning, and discharge and notify her in writing that this has been and that these unlawful actions will not be used in any way against her.

ALLIED STORES CORPORATION D/B/A
THE BON MARCHE

George I. Hamano, Esq., for the General Counsel.
Thomas E. Platt, Esq., of Seattle, Washington, for the Respondent.
Finley Young, Esq., of Tacoma, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Olympia, Washington, on March 19, 20, and 21, 1991. The charges in the captioned cases were filed by the United Food and Commercial Workers Union, Local No. 367 (the Union), on various dates between April 2 and November 9, 1990.

The petition in Case 19–RC–12155 was filed by the Union on March 7, 1990. An election was conducted on May 18, 1990. The tally of ballots shows that of approximately 105

eligible voters, 26 votes were cast in favor of the Union and 71 votes were cast against the Union. Thereafter, the Union filed timely objections to the election.

On June 11, 1990, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued an initial Report on Objections, notice of hearing, and order consolidating cases, wherein the unfair labor practice cases were consolidated with the representation matter. The Regional Director issued a third order consolidating cases on December 31, 1990. The consolidated complaint alleges that Allied Stores Corporation d/b/a The Bon Marche (the Respondent or the Company) has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent's various answers to the aforementioned pleadings deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General counsel, counsel for the Respondent, and counsel for the Union.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business located in Olympia, Washington, where it is engaged in the business of operating a department store. In the course and conduct of its business operations, the Respondent annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of Washington.

It is admitted, and I find, that the Respondent is now, and at all material times herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all material times herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The representation petition in Case 19-RC-12155 was filed on March 7, and the election was held on May 18, 1990,[1] in the following unit:

> All employees employed by the Employer at its Olympia, Washington facility, including employees employed in the leased shoe and jewelry departments, and cosmetics counter managers, but excluding all guards and supervisors as defined in the Act, and all ''high board'' students.

The Union did not prevail in the election, and on May 24 it filed timely objections.

[1] All dates or time periods hereinafter are within 1990 unless otherwise specified.

Holly Kelley worked for the Respondent from October 1988 until September 13, 1990, when she was discharged. She worked in the cash office from February 1989 until the date of her discharge. Prior to that time she worked on the sales floor as a sales associate. Kelley attended several union organizing meetings including the first meeting called by the Union which was held on Friday, February 24. On Monday, February 27, Cash Office Manager Cathy Nicks spoke with Kelley in the cash office. Nicks asked Kelley how she felt about the Union. Kelley replied that she was ''neutral.'' Nicks went on to say that the Union was not any good and would not do Kelley any good, and that the Union would just harass the people and not get them anywhere. Nicks told Kelley to feel free to ask her any questions she may have about the Union.

Nicks testified that she did not recall having this conversation with Kelley.

That evening Store Operations Manager Julie Stengem initiated a conversation with Kelley in Stengem's office. Stengem said that someone had told her that Kelley had attended the union meeting. Kelley acknowledged that she had. Stengem said, according to Kelley, ''Well, what is your opinion concerning the Union?'' Kelley said she was still neutral, and was trying to weigh the pros and cons of union representation. Stengem replied that she knew Kelley would make a ''professional decision.'' Stengem said that someone had told her that at the meeting the Union promised the employees better wages and benefits. Kelley replied that was not so, and that the union representatives made it very clear that they could not promise anything; all they could do was negotiate and try their best. Stengem said that she and Kelley had a good enough relationship that if Kelley had any questions or was unhappy, she could talk to Stengem about these matters. She also said that she didn't need anyone to ''communicate between us'' and that a union was unnecessary.

Thereafter, Kelley attended several meetings called by the Respondent and attended by most of upper management and the employees. Gilbert Graham, director of labor relations for all of the Respondent's 40 department stores in 6 states, apparently conducted several of the meetings and made it clear that he was aware of the union activity and was opposed to the Union.

Kerry Kinville is a sales associate in the Woman's World and coats departments. She actively participated in the union organizing campaign. Kinville testified that a company meeting was held on February 26. Most of the employees attended. Graham and Store Manager Tom Goodman were the spokesmen for the Respondent. Graham said that he understood there had been a union meeting to organize the employees and he was there to talk to the employees about why a third party was not needed and why the employees already had a ''contract.''

Graham held three meetings with the employees to advise them about the Union. On of the meetings was initiated by the employees. At one meeting Graham showed the employees a wage progression document to demonstrate that the Respondent did have policies and procedures that would offer protection to employees in certain situations. Regarding seniority and staffing, Graham pointed out the store policy that ''where merit and ability are equal, then tenure should be used for the assigning of hours and schedules.'' This has been in effect since 1984.

On March 7, the day the Union filed the representation petition, Kelley had a meeting with Store Manager Tom Goodman. Kelley had requested the meeting to discuss the possibility of entering the Respondent's manager training program. When Kelley walked into Goodman's office, he immediately asked her what her position was regarding the Union. Kelley said she hadn't made up her mind yet. He told her that she had been working there for 1-1/2 years and was earning what someone who had worked there for 2 years would have been making. He said, according to Kelley, that ''I take care of my people,'' and asked her if she was prepared to pay $125 in union dues and initiation fees. Kelley said no, she couldn't afford that. There was discussion of the manager trainee program. Goodman said he valued Kelley's expertise as a cash office associate, and would get back to her about the manager trainee program. He mentioned that the Respondent's Tacoma, Washington store had a union and ''that if anyone wanted to work in a union store, he'd gladly transfer them, because he did not want a union in his store.''

Goodman testified that during the aforementioned conversation, Kelley asked what it would take to become a department sales manager. Goodman explained the program to her, and after some discussion, Kelley told Goodman that she was very interested in the opportunity. During the course of the conversation, Goodman told her that a manager may have to be willing to relocate and, in this context, he told her that if someone was interested in relocating to the Tacoma store, which happened to be unionized, that type of thing could be worked out.

Several employees had been circulating an antiunion petition among the employees at the store. Kelley initially decided that she was against the Union and signed the petition on March 10. However, on March 12 she removed her name from the petition by drawing lines through her name.

On March 16, Kelley was advised by Store Personnel Manager Sharon Hartmann,[2] that her hours were being reduced. There were four nonsupervisory employees in the cash office, namely, in order of seniority, Jeanne Pontius, Susan Price, Kelley, and Laura King. Hartmann explained to Kelley that Pontius, who had been on a reduced schedule of 16 to 25 hours per week, had requested more hours because of financial hardship, and that Price wanted to work 16 hours a week; as a result, there were not enough hours to permit Kelley to work her customary schedule of 35 to 40 hours, and she would thereafter be working only approximately 22 hours per week. Kelley explained to Hartmann that she supported herself and, like Pontius, had financial obligations and need to work full time. In this regard, Kelley suggested that King, who had the least departmental seniority, be transferred to another department so that Kelley could maintain her full-time schedule; Kelley added that the cash office had previously operated for several months with just three associates and a manager. Hartmann replied that transferring King would not work out, because it was necessary to have more employees who were trained on cash office procedures so that the cash office would have a sufficient number of qualified employees to cover for holidays and vacations. Kelley mentioned that in the past one of the gift-wrap employees would be assigned to the cash office on a temporary basis to fill in for employees' holidays and vacations. Hartmann said that the particular gift-wrap employee Kelley was referring to did not work for the Respondent any longer, and that ''it doesn't work that way.''

Kelley then asked if she could pick up extra hours as a ''rover,'' an associate who has no assigned department but floats from department to department on a daily basis. Hartmann said that that was a possibility and that when the next weekly schedule came out Kelley would be placed on the schedule as a rover and could pick up extra hours in this manner. Kelley said that was fine with her.

Hartmann's version of the aforementioned conversation is generally consistent with Kelley's account. Hartmann testified, however, that there was more to the conversation. She also told Kelley that the cash office could not operate with only three associates and a manager, as one of the associates, Price, worked only a limited number of hours, and that compounded the staffing problem. According to Hartmann, Kelley told her that she had worked on the selling floor prior to working in the cash office, and expressed an interest in relinquishing her position in the cash office and returning to work on the selling floor on a full-time basis. Hartmann told Kelley that there were no full-time positions open on the selling floor, and Kelley asked if she could become a full-time rover. Hartmann said she could not guarantee that Kelley would be able to work more hours as a full-time rover, but that Kelley should call her on days that she was not scheduled to work in the cash office, or on days that she had a short shift in the cash office, and Hartmann would try to accommodate her.

Hartmann testified that she attempted to accommodate Kelley when she could, but that Kelley's availability as a rover was somewhat limited, as exhibited by several ''availability of hours'' documents which Kelley filled out. However, the documents show that from March 23 to May 30, Kelley was available as a rover or as a cash office associate during the entire Monday through Sunday period, with the possible exception of Sunday and the night shift on Tuesday, for which periods Kelley entered the notation ''check with me.'' Following May 30, she was available for all shifts during the 7-day week except between the hours of 5:30 to 9:30 p.m. on Tuesdays and Wednesdays.

Kelley was upset with the Respondent for reducing her hours, and thought the reduction was in retaliation for her decision to remove her name from the antiunion petition, which she believed the Respondent's management had seen. On March 20 she met with several union representatives in a restaurant in the shopping mall in order to advise them of her concerns. The restaurant is located directly across from the entrance of the Respondent's store. During Kelley's conversation with the union representatives, both Lori Johnson, cosmetics manager, and Hartmann, entered the restaurant and glanced at papers on the table at which Kelley and the union representatives were sitting. According to Kelley, one of the papers was headed ''Account of Harassment'' in letters large enough to be legible to someone standing up. Kelley said ''hi'' to Hartmann, and she did not respond. Thereafter, according to Kelley:

> And then Tom Goodman walked out to the very edge of The Bon Marche court, which is just a phrase to describe the area that's right in front of The Bon. It's

[2] Sharon Hartmann's name appears variously in the record as Sharon Hartmann, Sharon Dishion, and Sharon Dishion-Hartmann.

> open. People can sit down. He walked up and stood there with his arms crossed and observed us and me and the union people and Kim Rinehardt in the Pockets Restaurant for quite a while.

A representation hearing was held on March 27. Kelley testified as a witness on behalf of the Union. She was also an observer for the Union during the election held on May 18. Further, Kelley appeared in a 20-minute video which the Union produced and provided to each employee on the eve of the election. It was admitted that the video was viewed by Respondent's managers. Kelley played a prominent part in the video, which consisted of a lengthy discussion between a union representative and several employees. In the video Kelley expressed her feelings in support of a union contract for the employees.

Kelley worked as a rover on a limited basis. She apparently would check the cash office schedule to see if she had been given hours as a rover in any other department; if she was not listed as a rover on this schedule, she would then check the rover schedule maintained in the personnel department. Kelley testified that she was given only a limited number of rover hours.[3] Further, according to Kelley, during this period the Respondent was hiring new employees who were being assigned as rovers. These employees, according to Kelley, were hired in March and were assigned to work as rovers from 4 hours per week to as many as 30 or 40 hours per week. Although some employees with more seniority than Kelley were also working as rovers, Kelley testified that only ''a couple'' of rovers on the separate rover schedule which is kept in the personnel office had more seniority than Kelley.

Nancy Threadgill, a current employee, testified that she observed that approximately 12 new employees were hired in March.

Employee Kerry Kinville testified that in early January she had a conversation with her supervisor, MacKenzie, regarding the fact that the slow part of the retail season was approaching, and that Store Manager Goodman had made it very clear that the store would be working with a skeleton crew, that there would not be rovers working on the floor, and that things would be tight, but that she was going to do her best to get Kinville as many hours as possible. However, according to Kinville, a week or two after the first employee meeting in March the Respondent began hiring new employees, and hired about 10 of them in a 2-week period. Many of them were working 40 hours per week and were given full shifts on the floor.

Personnel Manager Hartmann testified that it is customary to hire new employees in the spring of each year, as it is necessary to have a larger number of employees during that season in order to provide replacements for employees who will be taking their vacations, and also because of an anticipated seasonal increase in business. However, she believes that only four or five new employees were hired during the time period in question.

Hartmann described the store's scheduling problems. The store is open 7 days a week, with several shifts each day, including evening shifts. Scheduling under these circumstances is a difficult process, and it is necessary to have a sufficient number of employees available in order to allow for flexibility and contingencies.

On three or four occasions, Kelley worked as a rover in the men's furnishings department under the supervision of Manager Cheryl Knight. On about May 19, Kelley asked Knight when she would be permanently assigned to Knight's department as a full-time rover. Knight replied that ''upper management told her that I would not be allowed to work . . . as a rover any more because they were afraid I would count down the registers.''[4] Kelley asked why she would want to count down the registers on the sales floor where she could be observed; and added that if she wanted to steal money she could do so back in the cash office with the door shut. Kelley testified that both Laura King and Jeanne Pontius had been permitted to work on the sales floor after working in the cash office.

As a result of not being given sufficient hours as a rover, Kelley began working for another employer on a part-time basis.

In July, Kelley's hours in the cash office were increased to her former schedule as Price had left and Pontius was transferred to another department. The cash office apparently operated with three associates and one manager from July until September 13, when Kelley was terminated.

Cash Office Manager Cathy Nicks testified that during the summer of 1989 both she and Kelley were applicants for the position of cash office manager. Nicks, who had not worked in the cash office prior to that time, was given the job, and, according to Nicks, Kelley resented the fact that she was having to train Nicks in cash office procedures. This caused, initially, a ''strained, stilted'' relationship. In the fall of 1989, Nicks felt that the relationship continued to be somewhat strained, and that this was affecting Kelley's performance. Both Nicks and Store Operations Manager Stengem spoke ''informally'' with Kelley during a meeting in October 1989, regarding Kelley's attitude and ''accuracy in counting,'' as, according to Nicks, Kelley ''continually made mistakes'' counting money. Kelley was not given a written warning, and there is no evidence that Kelley's attitude and performance did not improve or become acceptable after that discussion.

Kelley testified that she believed the aforementioned conversation took place in September rather than October 1989, but admits that she was cautioned about her attitude and work performance.

On July 28, Kelley received a written warning for failing to follow proper closing procedures in the cash office. During a meeting with Manager Nicks and Personnel Manager Hartmann, Kelley was told that on Friday, July 24, she had not placed the $2000 cash office window fund back into the vault at the end of the business day, and that the money had been left in the window drawer overnight. This is contrary to company policy. Kelley was told that she would need to review cash office policies and procedures with Nicks following the signing of the written warning. During this meeting with Nicks and Stengem, Nicks told Kelley that she was

[3] The record does not indicate the number of rover hours which the Respondent actually assigned to Kelley during the period when her full time hours in the cash office were reduced.

[4] Counting down the registers is a method of stealing money by making it appear that the cash register sales were fewer, or of a lesser amount, than the actual cash register transactions. Apparently, cash office employees had the expertise to adjust the cash register transactions in this manner.

a good employee, that she was aware of cash office policies and knew what to do, and that ''we are entitled to make our mistakes.'' She said she would review the policies with Kelley, as Stengem had instructed. Kelley said that she did not recall leaving the money out, but that she was sorry if she did so. She signed the written warning. The warning, entitled ''Record of Personnel Interview,'' states:

> On 7/24/90 Holly Kelley was responsible for closing the cash office. That evening Holly left the $2000 change fund in the cash office drawer (unsecured) instead of placing the money in the store safe which is the standard cash office procedure.
>
> Holly must show immediate improvement in her attention to the detailed policies and procedures, which the cash office position requires, or further disciplinary action may be taken.
>
> Holly should review cash office policies and procedures with her manager Cathy Nicks to insure her understanding of all procedures and ensure the security of the cash office funds.

Kelley testified that although she had apparently left the money in the drawer overnight and had neglected to put it in the vault, she believed the cash drawer was locked.[5]

Kelley testified that on various occasions cash office associates or the cash office manager neglected to return the cash fund to the vault at the end of the day, as set forth in the following four examples.

Thus, Kelley testified that in the fall of 1989, she discovered that Pontius, who had closed the cash office the night before, had left out the change fund in the cash office drawer. Kelley told the then cash office manager, Luana Bue, about this and Bue, Kelley, and Pontius had a conversation about it. Bue told Pontius that she had left out the money overnight, and Pontius said she was sorry and would try not to do it again. Pontius received no written warning.

In about November 1989, employee Katherine Hitchman left out the change fund and Kelley discovered it in the cash drawer the following morning. Kelley told Cathy Nicks, who had become the cash office manager, about the matter. Kelley does not know whether Hitchman received any warning or discipline for this, and, although Nicks was called as a witness by the Respondent, she did not specifically testify regarding this matter.

In July, 2 weeks before Kelley received her written warning, Pontius had again neglected to place the change fund in the vault and it was left out overnight. Kelley pointed this out to Pontius, but did not tell Nicks about the incident as she did not want to get Pontius in trouble.

In early 1990 Nicks left out the change fund in the cash drawer the preceding evening. Again, Kelley discovered this the following morning and told Nicks about this. Nicks said she was sorry.

Nicks testified that when she discovered that Kelley had not placed the cash fund in the vault, but had left it out overnight in the window drawer, she reported this to Stengem. Nicks believes that the drawer was not locked, as she does not recall having to get a key to unlock it on the morning in question. She was not aware of any other cash office employees who had left the window fund unsecured overnight; nor was she advised by Kelley in early 1990 that she had left out the window fund. Further, as mentioned above, she does not recall having a conversation with Kelley about the Union in February.

Tina Crowther is a current employee of the Respondent. She is a sales associate in the children's department. Crowther testified that on July 4, she was assigned to close the register for the day. She forgot to turn in the cash bags, containing from about $200 to $600, to the cash office at the end of the shift. Rather, she left the bags in the stockroom when she picked up her coat at the end of the day. When she got home from work there were two messages on her answering machine. Both were from Personnel Manager Hartmann. The first message was to advise her that the bags were missing. The second message was to advise her that the bags had been found in the stockroom. Less than a week later, Operations Manager Stengem remarked, in passing, on the selling floor, that this ''was not a good thing to do, that it was wrong.'' A few days later, Crowther was called in to Hartmann's office. Crowther's department manager, MacKenzie, was also present. Hartmann asked Crowther if she was under any sort of pressure which would cause an ''unprofessional act'' of that nature. Crowther said she was okay, and that she understood how serious the matter was, and that she would not do it again. Nothing was said about her job being in jeopardy, and she received no written reprimand.

Kimberly Rinehardt, a social worker, shares an apartment with Kelley. Both she and Kelley are from the same hometown. Rinehardt became acquainted with Nicks through Kelley. On July 31, Rinehardt invited Nicks to lunch, purportedly to discuss personal matters relating to social work assistance for Nick's son. During the luncheon conversation Nicks began talking about what was happening at the store. Rinehardt stated that employees of the Respondent should be able to get the wages they wanted without being harassed. Nicks, according to Rinehardt, stated that any employee who was not happy with the wages could go elsewhere, and ''angrily gripped the table and told me that The Bon Marche was not trying to set up Holly [Kelley] or get Holly, that if Holly was to leave The Bon Marche, it would be by her own hand, something she did herself.'' Nicks said things like, ''Holly needs to change her attitude; Holly needs to watch out; Holly needs to be careful.''

During the aforementioned conversation, the warning that Kelley received for leaving out the $2000 cash fund was discussed. Rinehardt testified that Nicks said that she was satisfied with Kelley's positive response to the warning. Rinehardt, who apparently was thoroughly familiar with the happenings at the store, said she thought it was interesting that Pontius had engaged in similar conduct and had not been written up. Nicks, who had her mouth full, nodded affirmatively, but did not verbally respond. Rinehardt then brought up the fact that an employee from the childrens' department had left about $300 in the back room and had not been written up. Nicks replied that she, Nicks, didn't have anything to do with that. Rinehardt thanked Nicks for treating Kelley fairly and as a friend.

Nicks testified that she was ''just shocked'' when Rinehardt invited her to lunch, as this had never happened before. She acknowledged, however, that both she and

[5] However, there was conflicting record testimony regarding whether the lock on the cash drawer was functioning properly during the period in question.

Rinehardt shared a common interest in psychology as she had received a degree in that field and Rinehardt was completing her course work for a psychology degree. Further, Rinehardt, who was working as a social worker for the State of Washington, had indicated on prior occasions that she might be able to give Nicks some leads regarding child care for her son.

According to Nicks, Rinehardt said that the real reason she invited Nicks to lunch was to thank Nicks for her understanding and support of Kelley. She spoke about Kelley's family background and shared other personal insights. During the course of the conversation, Nicks said that Kelley was a valuable employee with much potential; she said that everyone made mistakes, and she hoped that Kelley would be able to put the written warning in perspective and move forward in a positive manner. Nicks recalled nothing further about the conversation. She did not deny that she expressed to Rinehardt that Kelley needed to change her attitude, or to be careful, or to watch out.

On August 13, after Pontius was no longer working in the cash office, Kelley noticed that she was scheduled to work a fraction of an hour less than Laura King, a less senior employee, during the following week. This apparently occurred because Kelley was required to work a Sunday shift that week and a Sunday shift contains fewer hours than shifts on other days. Kelley took the schedule to Hartmann's office and told her about this, and explained that as a result of what had happened some months earlier when her hours were reduced because Pontius, a more senior employee, wanted more hours, Kelley believed that she was entitled to more hours than King. Kelley explained that it was not necessarily the number of hours that troubled her, as the difference in hours was negligible, but rather it was the principle of the matter; and that as the more senior person in the department, she was entitled to more hours. Hartmann said she would talk to Stengem about the matter. However, the schedule was not changed.

Kelley then spoke to Stengem about the schedule. Kelley explained to Stengem that it was the principle of the matter, rather than the number of hours, that concerned her. Stengem asked whether Kelley was asking her to make changes that adversely affected the Respondent's business so that Kelley's ego wasn't hurt, and explained that if Kelley worked a different shift this would put her in an overtime situation and require the Respondent to pay her overtime pay. Kelley simply reiterated that as the senior employee, she was entitled to more hours than King. Stengem said, ''Well, Holly, we're not here to get you; we're not out to get you and take your hours away.'' Stengem refused to change the schedule. Thereafter, there were no other problems with Kelley's schedule.

Personnel Manager Hartmann testified at length and provided documentary evidence of the fact that, due to complex scheduling considerations, it was not uncommon that a more senior employee would, on occasion, necessarily receive fewer hours during a given week than a less senior employee.

About the first week of September, Kelley happened to see Cheryl Knight, manager of the men's furnishings department, near the cash office. For a reason unexplained in the record, Knight's status was being changed from that of a manager to that of a sales associate. Kelley said to her, in a joking manner, ''Oh, hi, you're going to be a peon.'' According to Kelley, Knight ''kind of laughed, and she looked over at John Doll [who had recently replaced Goodman as store manager] and I followed her gaze and saw John Doll standing there and looked back at her, and she laughed a little bit more, and then we just both went our separate ways.''

Shortly thereafter Kelley was called to Stengem's office. Those present were Kelley, Stengem, Laura King, John Doll, and Tom Goodman. Stengem said that she had heard that Kelley was making derogatory comments about employees. Kelley answered that she didn't know what Stengem was talking about. Stengem said that ''a certain someone'' said that Kelley had called Knight a peon. Kelley said yes. Stengem told her to refrain from calling any of the employees peons, as the Company does not approve of this. Kelley said she didn't know that Knight was offended, but that she would call her and discuss it with her. She said she would refrain from using derogatory remarks.

Later that day Kelley spoke to Knight and said that she was sorry, and asked if she was offended. Knight said no, she wasn't offended, and that ''it just goes in one ear and out the other; don't worry about it; I wasn't offended at all.'' Kelley then asked why she had been reprimanded. Knight replied, according to Kelley, that Store Manager John Doll told her that he was offended, and Julie Stengem also thought the remark was inappropriate. Kelley said that she didn't mean to cause all the ruckus. Again Knight said she wasn't offended, and added, ''you need to be careful what you say, because they will use it against you.''

Rinehardt also had a conversation with Knight about the ''peon'' incident. Rinehardt happened to be at Respondent's store in order to pick Kelley up from work. She approached Knight who, insofar as the record indicates, continued to occupy her managerial position, and jokingly said, ''I hear you're going to be a peon.'' Knight, according to Rinehardt, ''got really serious'' and said that she was not the one who was offended by that comment; rather, John Doll overheard the comment and was offended, as was Stengem, but Knight had no problem with it. Rinehardt testified that:

> Then we were talking about why she [Knight] was stepping down from management, and she had said that it was a matter of conscience, that she needed to step down; she couldn't handle the stress any more. And she said that Holly [Kelley] needed to be careful, that she had been in on meetings where management had discussed Holly and other troublemakers and that she needed to watch her back, that management didn't forget.

Rinehardt suggested that Knight talk to the Union about this, and Knight said, according to Rinehardt, that ''she didn't want to be involved, that that was part of the reason why she was stepping down and that she would just root for Holly from the sidelines.''

Knight, called as a witness by the Respondent, is currently a sales associate in the men's furnishing area. Knight testified that she ''just kind of smiled'' when Kelley made the ''peon'' remark to her although she thought the comment was inappropriate and unprofessional. Later. Stengem approached her and asked if it was a private joke, or whether

her feelings were hurt. Knight said that she felt ''slighted a little'' but that it was ''no big thing'' and that she was okay.

When questioned further about the incident, Knight testified that she was ''shocked'' at Kelley's remark and it ''stunned'' her. Asked to explain why she was shocked, Knight testified:

> Because I was stepping down, and I was making decisions for my family at the time, and I don't like to let down my company. I was real supportive of it, and it was a decision of personal choice, but just to be slammed for doing it, I felt kind of out of place.

Knight said that the remark was disrespectful, and that ''you don't slam friends when they're down.'' Several days later Kelley apologized to her.

Knight was asked only two questions by Respondent's counsel regarding her conversation with Rinehardt, namely, whether Knight knew Rinehardt and whether she ever told Rinehardt words to the effect that the Respondent was out to get Kelley. Knight said that she knew Rinehardt but that she did not make such a statement to her. On cross-examination, Knight admitted that she attended management meetings during the organizing campaign as she was a manager at that time, that things going on in the store regarding the Union were discussed at these meetings, and that it was general knowledge that Kelley was involved in the union campaign.

Kelley testified that on September 11, Laura King, who had been promoted to cash office manager that week in place of Nicks, advised Kelley that she was going to have to report to Operations Manager Stengem that Kelley had left the $100 change bag fund in the cash office cash register drawer when she closed the previous Sunday night.[6] Kelley said that she would be fired for that because they were looking for an excuse to fire her, and suggested that perhaps she should just quit before she was fired. King said that she doubted that Kelley would be fired, and added, ''I can't lose you now.''

On September 13, Kelley was called in to Personnel Manager Hartmann's office. Stengem was also present. Kelley testified as follows:

> [Hartmann] said that I had allegedly left—I had left out the $100 change fund and that, given the severity of the situation, did I leave the money out? And I said, I don't remember leaving the money out, you know, but if I did, I'm sorry. And she said well, this is a severe case. They said something about procedures and policies, and I said, I'm aware that I could get terminated for this, and they just shook their heads and dismissed me and said that they would call me back later with their determination whether or not they were going to fire me, so I went back to the cash office.

Kelley testified that she made the remark about being fired because she believed it had been stated in her prior written warning that any similar violation of policy would be cause for termination. However, Kelley was mistaken, as the prior written warning did not so state.

[6] This is a different fund from the window fund, and is the amount of money kept in the cash office cash register during the day. This money is also to be placed in the vault when the cash office is closed.

About 20 minutes later Kelley was called back to Hartmann's office. Stengem was present. Kelley was told that given the severity of the problem, they had no choice but to terminate her. Kelley said that she was really sorry, and left.

Personnel Manager Hartmann testified that it was common knowledge that Kelley was part of the union campaign effort. On September 9 Hartmann was told that Kelley had failed to place the $100 cash register fund in the vault and had left it in the cash register drawer in the cash room overnight. She called Kelley to her office on September 13. Kelley acknowledged that she had left out the money, and that this was the second time it had happened. She said she was sorry, that she realized this was a severe policy violation and she could be fired for it, and said that she was sure it would not happen a third time. Hartmann said she would get back with Kelley regarding the matter.

Hartmann then contacted Gilbert Graham, director of labor relations, in accordance with the Respondent's policy that Graham was to be involved in the event of a possible termination of any associate. Hartmann told Graham about the July 24 incident and the September 9 incident, and said that Kelley had left the money out on two occasions within a relatively short period of time. She told Graham that she considered Kelley's conduct to be grounds for ''possible termination.'' Graham asked Hartmann several questions, such as how long Kelley had been with the Respondent, how long she had been employed in the cash office, and whether Kelley had made any other errors during her employment. It was decided that Kelley should be terminated. There was no discussion of Kelley's union activity during the conversation.

Hartmann then called Kelley back to the office, and advised her that she was being terminated immediately.

Hartmann testified that to her knowledge the only employees who have been discharged during her 1-1/2 year tenure as Personnel Manager have been either probationary employees who were terminated within the 90-day probationary period for various work-related reasons, or, in the case of other employees, for theft of money or property. The Respondent proffered no evidence to the contrary.

Hartmann also testified that department managers were not authorized to issue written warnings; rather they were issued only by Hartmann. The Respondent introduced five written warnings into evidence. Four of the warnings were issued in August, September, and October 1989, and February 1990. Each denotes that it was ''originated by'' Personnel Manager Sharon Dishion (currently Sharon Hartmann), and specifies the nature of the employee's unsatisfactory work performance or, in one instance, excessive tardiness. Each warning notice specifically states that further instances of such conduct will or may result in ''termination.'' The fifth warning is dated December 8, 1990, subsequent to Kelley's termination, and was issued to another cash office employee for also neglecting to place the window fund of $3000 in the vault at the end of the day. The language contained therein is identical to the above-quoted language contained in the warning notice issued to Kelley, with the exception that Kelley's warning specifies that if immediate improvement is not shown, ''further disciplinary action *may* be taken,'' whereas the December 8, 1990 warning states that ''further disciplinary action *will* be taken.'' (Emphasis supplied.) Hartmann was not asked, and did not explain, why the warning she gave to Kelley did not advise her of the possibility of

termination, or why the wording of the December 8, 1990 warning was different from the warning given to Kelley.

Labor Relations Director Graham testified that all terminations of hourly associates must be approved either by Graham or by a designated individual in the central office. Regarding Kelley's union activity, Graham testified that, ''Certainly, I was aware that she was prounion. I mean, she spoke up in meetings and made it very clear, plus I'd seen the video, so it was quite clear that she was strong for the union.'' Graham further testified that during his conversation with Hartmann there was a review of Kelley's work performance, because:

> [O]bviously, knowing the fact that she was a very strong proponent of the union, and in my capacity as director of labor relations, I knew that this was a sensitive termination and that I wanted to ask questions and fully understand what was happening before termination took place, and that's why I was asking about length of service, and priors [sic] and things of that nature so that I could get a very good handle on this to make the proper decision.

Graham testified that it was not mandatory that an employee be discharged after two warnings. Rather, according to Graham, ''There is discretion, always some discretion.'' Graham went on to testify that the two warnings, coupled with the fact that Kelley had made errors in the past in counting money, warranted her discharge, as the nature of her job was to be accurate and safeguard the funds of the company. Graham stated that the possibility of placing Kelley in a sales position, which work Kelley had previously performed, was neither contemplated nor discussed during his conversation with Hartmann.

Goodman testified that during his tenure as store manager of the Olympia store, the ''termination of an employee is precluded [sic] with at least three written warnings, unless it's a termination for theft.'' However, Goodman did not participate in the decision to terminate Kelley, as he had been assigned to manage a different store prior to that time. Graham testified that Goodman was incorrect that Respondent's policy required three written warnings prior to termination of an employee.

Shari Thompson was a sales associate from April 1989 until October 1990. She was a member of the Union's organizing committee. Thompson testified that Audry Raymond, also a member of the Union's organizing committee, returned to work after an absence, and worked as a sales associate in the same department as Thompson. It was believed that Raymond had more seniority than Thompson as a result of having previously worked for the Respondent, and that Raymond was therefore entitled to more work hours than Thompson. However, Marie Miller, a manager trainee and Thompson's supervisor, had previously told Thompson that productivity, rather than seniority, governed the allocation of work hours. Thompson complained to Miller, and said that she, Thompson, should have more hours than Raymond because her productivity was greater. Thereafter, Thompson's hours were increased, and Raymond's were decreased. Thompson assumed that this was because of her higher productivity.

Raymond did not testify in this proceeding. It is the General Counsel's contention that Raymond should have been given more hours than Thompson because Raymond had greater seniority, and that the Respondent deviated from its past policy of allocating working hours on the basis of seniority as a result of Raymond's union activity. It is the Respondent's position that both Raymond and Thompson were equally involved in activity on behalf of the Union as members of the Union's organizing committee, and that even if the Respondent had misapplied its policy of allocating hours, the favoring of one union adherent over another cannot constitute discrimination. Further, the evidence proffered by the Respondent demonstrates that, in fact, Thompson, not Raymond, had greater seniority.

Thus, Personnel Manager Hartmann testified that initially the manager trainee, Marie Miller, believed that Raymond had more seniority than Thompson. However, Hartmann explained to Miller that Raymond's break in employment was longer than 30 days and that therefore her seniority was not retroactive and was less than Thompson's, who was hired prior to Raymond's return. According to Hartmann, Miller was simply mistaken when she told Thompson that productivity rather than seniority was utilized as a basis for allocating work hours; rather, seniority, not productivity, was the operative standard, and Thompson had greater seniority.

Sue Wood is a sales associate in the children's department. Her supervisor is Michelle MacKenzie. During the past 3 years she received the department's achiever's award for having the highest sales in the department. She was on the Union's organizing committee, solicited signatures on authorization cards, and attended union meetings. During various meetings called by the Respondent she expressed her prounion views.

On October 24, Wood arrived at work on time but went directly to the stockroom to put her coat away, and, while in the stockroom she discussed something with her manager, MacKenzie. When she returned to the sales floor it was 5 minutes later than her reporting time, and Wood filled out a time discrepancy form stating that she was at work on time. Wood testified that she has had occasion to utilize this form on the average of about twice a month. She filled out the form and placed it on top of the cash register. Later, Division Manager Pam Rupert passed by and saw the form, and told Wood that the form was incorrect as Wood had not come to work on time, and that, in fact, she had come in late. Wood told her to ask Rose Johnson, an employee in another department, as Wood and Johnson had arrived at work together that morning.

Apparently, the gravamen of the complaint allegation involving this matter is that, as a result of Wood's union activity, Rupert simply was unwilling to accept, at face value, Wood's statement that she had in fact arrived at work on time, and disputed Wood's assurance that she had not been late. Some manager other than Rupert apparently signed the form for Wood, and she lost no pay as a result.

Rose Johnson, a current employee of the Respondent, testified regarding the discrepancy form matter. She said that on the day of the incident, she was approached by Division Manager Rupert who asked her if she and Wood had entered the store together. Johnson said that she and Wood had come through the door at the same time. Since the respective departments of Wood and Johnson are apparently at opposite ends of the store, Johnson would be in no position to know when Wood arrived at her department.

In the first part of November, during Wood's monthly review, Manager MacKenzie told Wood that she was rated excellent in all respects. MacKenzie also pointed out that Wood had been late to work one day during the review period.[7] Wood disputed this, explained what had happened, and claimed that she was being harassed. She refused to sign the form. According to Wood, Jeanne Pontius, who worked with Wood, was late almost every day either in arriving at work or in returning from breaks.

Personnel Manager Hartmann testified that the monthly sales associate review form is designed as a communication tool, and is utilized to evaluate the associates' performance in various aspects of their work, namely, customer service, sales production, credit performance, attendance, personal trade, appointment sales, and dress code. The review for any given month is delayed from a 1-1/2 to 2 months due to the fact that the sales performance information is automatically transferred from the selling floor cash registers into the central computer system for all stores, located in another city, and is later forwarded to the particular store. Compiling and forwarding the information causes a substantial lapse of time between the end of a review month and the date of the actual review with the associate. However, records of certain items, such as attendance, sales production, and credit performance, are kept in a ''brown'' book in the personnel office, and the managers obtain this information from the book prior to the employees' monthly evaluation. The records show that approximately 10 percent of the review forms of the employees, including that of Pontius, included information to the effect that they had been late or tardy during the period in question. Hartmann testified that the managers are simply instructed to point this out to the employees, so that the employees may monitor their attendance record, and that this is not considered a warning or an indication of adverse action.

Regarding the fact that Division Manager Rupert, who did not testify in this proceeding, refused to sign Wood's various time discrepancy forms, it is the Respondent's contention, and Hartmann so testified, that some managers simply are more cautious than others, and that this had no effect on Wood's overall performance rating.

On about November 2, a customer wanted to buy a coat for her child at a sale price, although no sale was in progress. Wood said that she would ask her manager. Wood then went to the restroom while the customer continued looking at the coats. In the interim, the customer apparently asked Manager MacKenzie whether she could have the sale price, and MacKenzie said no, as the item was not on sale. Upon returning from the restroom, Wood asked MacKenzie whether Wood could give the customer the sale price. Wood acknowledged that prior approval is required to give a sale price on a nonsale day. MacKenzie told Wood, ''Well, if you told her she could get it, then go ahead and give it to her.'' Wood did so, although she had not previously promised the customer the sale price. On November 5, Wood received a written warning for the incident.

Wood testified that she was falsely accused of writing a derogatory note to her supervisor, MacKenzie. Someone had written ''fuck you'' on a work list that MacKenzie had left for the employees, and had apparently put the list on MacKenzie's desk in the stockroom. MacKenzie asked both Wood and another employee whether either of them had done this and they both said no. Wood testified that even though they said they were not responsible, MacKenzie went on to state that ''We won't stand for this,'' as if she did not believe them. About a week prior to this time they had both complained to the personnel manager about MacKenzie's frequent absences from the department.

During the union organizing campaign, Store Manager Goodman held a meeting with the employees and told them that there was going to be a change from the incentive system to a new commission system. Goodman testified that he thereafter met with employees on an individual basis to acquaint them with the new commission system. He reviewed their individual sales for the preceding year in order to demonstrate how the system would have benefited them had it been in effect during the fall of 1989. He met with over half of the approximately 100 employees during the course of 4 or 5 days. He made no comparison of the commission system with the wages paid at unionized stores of the Respondent.

Sheri Thompson, a sales associate, testified that in March or April she was called in to Goodman's office and he spoke to her for about 30 minutes regarding the new commission program for sales associates. Goodman explained the program to her and, using her monthly sales figures for the prior month, demonstrated to her that she would be making $100 to $200 more per month under the new commission program. Thompson testified that Goodman also told her that she would not have such a commission system in a union store. Goodman testified that the commission system had been under consideration for quite some time, and that the employees had been made aware of this. He said that he had previously held a meeting with all the sales associates in October 1989, and discussed the commission system. He told them that he had received some very favorable comments regarding the commission system from various sales associates, that the matter was in the process of being explored, and that the Respondent would ''be pursuing'' that in the next year. He again mentioned the commission system during a meeting with the employees in January 1990. Goodman testified that he has been a proponent of the system for a long time, and that he had been working on it for at least 6 months prior to October 1989, although he had never initiated individual conversations with the sales associates about the commission program until the Union began organizing the employees.

Employee Rose Johnson testified that she heard rumors of a commission system far in advance of the union campaign, and that in January, during her review, Manager MacKenzie asked her what she thought about Respondent going to a commission system. Johnson said that would be fine as long as her wages were not reduced. MacKenzie told her that the wages would remain the same, but that the employees would, in addition, receive a commission on their sales.

Employee Kerry Kinville testified that during a monthly review in late February, Manager MacKenzie told her that Goodman was looking into the possibility of a commission program, and that it would be like the one in effect at the Tacoma store. MacKenzie demonstrated to her on a piece of paper how the program would work, and said that they had not yet decided to implement the program but that they were

[7] This incident is unrelated to the preceding incident involving Division Manager Rupert.

just trying to find out what the employees' opinions were regarding the program.

Documentary evidence introduced by the Respondent shows that the commission system has been under consideration since June 1988, when a task force of the parent corporation of the Respondent recommended that ''By Fall 1990, 100% of all sales people . . . shall be on the Federated/Allied Incentive Commission Plan.'' The stated written objective of the plan is to ''obtain the highest quality sales associates and managers through a superior compensation program.''

On March 13, 1989, Graham recommended that the program be implemented at the Respondent's stores. It was implemented at various unionized stores of the Respondent in early 1990, after collective bargaining with the unions.[8] By memo dated March 13, 1990, Graham advised that the commission program would be placed in effect at four additional stores, commencing in May for three of the stores, including Respondent's Olympia store, and commencing in August for the fourth store ''as part of their normal wage progression.''

During the union organizing campaign, union-related material was taken down by management from the bulletin board in the lunchroom. Prior to this time employees were permitted to use the bulletin board to advertise personal items for sale or for other announcements. After the campaign began the bulletin board was limited to work-related items only. Goodman announced this change at a meeting. He said, according to employee Sue Wood, ''This was his house, and . . . you cannot put anything you want up there; you have to have our permission.''

Nancy Threadgill, a current employee, testified that she attended a meeting on March 10 at the Respondent's premises. Various upper level representatives of the Respondent were present, including Uhrich, the corporate head of labor relations and Labor Relations Director Graham's superior, Graham, and Goodman. One employee asked why the Respondent would not permit union-related material on the bulletin board. Uhrich said that it was ''his house,'' and that the employees couldn't put anything on the bulletin board. He said that he was adamant about not wanting a union, that he didn't want any part of the union, and didn't like unions. Then Goodman spoke up and said that everything had to be preapproved before it was placed on the bulletin board.

Threadgill testified that prior to the union campaign, there were no bulletin board restrictions, and the employees were free to post wedding and birth announcements, and items for sale. When the union campaign began, such material was no longer permitted, and only work-related information was posted.

Employee Kinville testified that above the bulletin board in the lunchroom was the title ''The What's Happening Board.'' Employees could post anything on this board without permission. Kinville posted union-related documents on the board on a daily basis. On March 21, Kinville posted a comparison sheet, comparing the pros and cons of union representation. Kinville was in the lunchroom when Store Manager Goodman came in and removed the document, tore it in half, and threw it in the garbage can. He put the thumbtack in his pocket and left. A few weeks later, Manager Lori Johnson came in to the lunchroom and took down a union booklet, entitled ''Why Unions?'' which Kinville had posted.

Store Manager Goodman testified that during the union campaign he removed both prounion and proemployer material from the bulletin board after he was advised by his superiors that the bulletin board belonged to the store, and that no union-related material of any kind, whether in favor of or against union representation, was to be posted. According to Goodman, the bulletin board remained ''open and available'' to the employees for the posting of personal notices; however, Goodman also testified that he informed employees at a meeting that they had to have management's permission before they posted anything on the bulletin board.

Labor Relations Director Graham testified that there has been a longstanding policy at all of the stores that prior approval by the store manager must be given before items are placed on the bulletin board. However, compliance with this policy is not monitored every day, and when the union campaign began, ''a directive from corporate'' required the implementation of the policy, and prohibited any propaganda, either for or against the Union, from being posted on the bulletin board. Graham further testified that the policy permitted the posting of other types of material, apparently with management's approval, and that he observed that such material was posted on the bulletin board throughout the preelection period. He also testified that employees at the store were permitted to wear and did wear both prounion and antiunion buttons on the sales floor.

On October 29, employee Kinville had not been able to clock in on time as someone was using the register when she arrived at work. The employees clock in by entering their employee number into the cash register. Later that evening Kinville asked Division Manager Pam Rupert to sign her time discrepancy form, and Rupert refused to sign it as she did not see Kinville come in. She told Kinville to have her manager sign it. Kinville said that her manager didn't see her come in. Rupert said that she would have to take the form to a different manager, Lori Johnson. Kinville had Leo Cox, another manager, sign the form when he walked by even though he did not see her come in to work. Kinville said that it was customary for sales associates to fill out a time discrepancy form and leave it on the cash register, and that when a manager came by the manager would always sign it regardless of whether he or she had personal knowledge of the employees' remarks on the form.

On October 30, Division Manager Rupert approached Kinville and very loudly asked her where she had been, why she was not in her work area, and who was covering for her. Kinville had had some business-related things to do and had asked Katie Woods, a manager of two adjacent departments, to cover for her. Kinville told Rupert this. Rupert said that Woods was unable to cover Kinville's area as Woods had customers of her own, and she told Kinville to get back to her department right away. Kinville had never been confronted in this manner prior to this time.

In November, Kinville was given her monthly review for the month of September, as the reviews are customarily delayed for up to 2 months. Manager Reni Rodriguez gave her the review, which evaluates employees in various areas, such as sales, credit applications, absenteeism, and general performance. Rodriguez told Kinville that, although it did not appear on the September review, she had been late twice for

[8] Of the Respondent's 40 stores, 13 are unionized.

the month of October and that this would be reflected on her next review in December. Kinville testified that there is no category on the review for being late, and she asked Rodriguez how she was supposed to know that she was late. Rodriguez said that it was listed in a ''black book.'' During her next review, in December, Kinville was told that she had been late two times in the month of October. Kinville acknowledged that her prior manager, Katie Woods, during a review for the month of May, noted that she had been late.

Kinville testified that she was not scheduled to work on the Saturday after Thanksgiving by her supervisor, Reni Rodriguez, although she was normally scheduled to work on Saturdays. She complained to Division Manager Lori Johnson about this and was told that the scheduling for that week was complicated, but that Johnson would try to figure it out and let her know. Later she received a call from Johnson, who said she was sorry, but that she was not able to figure out how to schedule Kinville for that Saturday.

Manager Rodriguez testified that Thanksgiving week was an unusual week for scheduling as the store is closed on Thanksgiving. Rodriguez scheduled Kinville to work the Friday after Thanksgiving, which is the busiest day of the year. As a result of various scheduling considerations, it was not feasible to schedule Kinville for both Friday and Saturday.

IV. ANALYSIS AND CONCLUSIONS

A. *The Unfair Labor Practices*

Kelley testified that on February 27, 3 days after she attended the Union's first organizational meeting, her supervisor, Cathy Nicks, asked her how she felt about the Union, and went on to advise Kelley that the Union would not do the employees any good. Later that day, Operations Manager Julie Stengem called Kelley into the office and said that someone had advised Stengem that Kelley had attended a union meeting, and asked Kelley her opinion of the Union. I credit Kelley's accounts of these conversations, and find that such interrogation by Nicks and Stengem is violative of Section 8(a)(1) of the Act. Further, I find that Stengem's remark to Kelley regarding the Respondent's knowledge of her attendance at the union meeting created the impression that her union activity and the union activity of other employees were under surveillance, and is also violative of Section 8(a)(1) of the Act. *DeCasper Corp.*, 278 NLRB 143, 145 (1986); *Thriftway Supermarket*, 276 NLRB 1450, 1457–1458 (1985); *Roseburg Lumber Co.*, 278 NLRB 880, 887 (1986).

On March 7, the day the election petition was filed by the Union, Store Manager Tom Goodman asked Kelley how she felt about the Union during a meeting which Kelley initiated for the purpose of discussing the Respondent's management training program. During the discussion, Goodman advised Kelley that he did not want a union in his store, and told her that ''I take care of my people.'' He also told Kelley that he would gladly transfer any employee who wanted to work in a unionized store to one of the Respondent's stores that was unionized. I credit Kelley's account of the conversation, and find that Goodman coercively interrogated Kelley and, by obvious implication, made it clear to her that a promotion to a managerial position would be more likely in the event she elected to oppose the union. By such conduct the Respondent has violated Section 8(a)(1) of the Act.

I do not find, however, that Goodman threatened to involuntarily transfer employees to unionized stores because of their union activity. According to Kelley's account of the conversation, Goodman clearly stated that he would be glad to transfer them if they so requested. Such a statement does not amount to a threat of retaliation against employees who prefer union representation.

I do not find that the record evidence demonstrates that the Respondent discriminated against Kelley by reducing her hours of work in the cash office on March 16. In this regard, I credit the testimony of Personnel Manager Hartmann and find that Kelley's hours were reduced because another employee with greater seniority desired to be placed on a full-time schedule, and that staffing considerations required that the complement of employees in the cash office not be reduced.

However, it is clear that between 5 and 12 new employees were hired during the spring, and that Kelley could have been given additional hours as a ''rover'' in preference to newly hired part-time employees. The record shows that Hartmann was well aware of Kelley's union activity at this time, and of Kelley's expressed need to earn more than she was earning after her hours in the cash office had been substantially reduced; and Hartmann had on file the forms that Kelley had submitted showing that Kelley was available for assignment either as a rover or as a cash office associate during virtually all shifts of the entire 7-day workweek. I credit Kelley and find that in May, when she was working as a rover in men's furnishings under the supervision of Manager Knight, she was told by Knight that ''upper management'' was reluctant to give her more hours as a rover because of the possibility that Kelley would steal money from the cash register. This indicates that Hartmann's failure to schedule Kelley for more hours as a rover was not dictated by scheduling considerations, as Hartmann testified, but rather by Respondent's suspicions that Kelley may be dishonest; and the Respondent has proffered no evidence to substantiate this apparent suspicion.

Given the conflicting reasons for the failure to provide Kelley with more work as a rover, coupled with the credible record evidence that there was substantial rover work available which was being performed by newly hired employees, and that the Respondent's admitted policy was to give more senior employees preference in scheduling, I conclude that the record evidence establishes that the Respondent's failure to provide Kelley with more hours of work was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act. I find that such unlawful conduct extended from March 16, the date of Kelley's reduction of hours in the cash office, until some time in July, when she was again given full-time hours in the cash office.

I find that the record does not establish that the scheduling of Kelley to work a fraction of an hour less than Laura King, a less senior employee, during 1 week in August, was discriminatorily motivated. Rather, valid business considerations dictated this schedule.

It is clear that Kelley failed to return the $2000 cash office window fund to the vault on July 24, and that she left out the $100 cash register fund on September 11, some 6 weeks later. The record shows that such breaches of cash office policy are considered to be significant, and that in some instances they may go unreported by the cash office associate

who discovers the error in an effort to protect her fellow associate from the possibility of discipline. The record also shows, however, and in this regard I credit Kelley's testimony, that neglecting to return the cash office funds to the vault is a not uncommon occurrence, and that cash office associates and even managers have inadvertently failed to return the various funds to the vault at the end of the workday. Further, the record evidence shows that even though the money is left overnight in the cash office, and is not placed in the vault as it should be, it is nevertheless relatively secure in the locked and alarmed cash office.[9]

I credit Kelley and find that in the fall of 1989 two different cash office employees left out money in the cash office overnight, that this was reported by Kelley to the then cash office manager, either Luana Bue or Nicks, and that insofar as the record shows, neither associate was given a written warning. I further find that in early 1990, Cash Office Manager Nicks committed a similar infraction and that this was pointed out to Nicks by Kelley. And when a sales associate neglected to bring the cash bags, possibly containing as much as $600, to the cash office at the end of the day and rather left them in an unsecured room where employees have their personal belongings, this associate was not given a written warning by Hartmann.[10] Thus, the record shows that prior to the written warning given to Kelley, no other nonprobationary employee received other than a verbal reprimand for failing to follow established money-handling procedures.

It is significant that the written warning which Hartmann gave to Kelley on July 28 was unlike other warnings that Hartmann had previously issued to other employees. Thus each warning given by Hartmann to four other employees specifies that further infractions either will or may result in termination. The warning notice given to Kelley, however, does not mention termination, but rather states that ''further disciplinary action may be taken.''

I credit Kelley's friend and roommate, Kimberly Rinehardt, and find that former men's furnishing manager, Cheryl Knight, told her that Kelley needed to be careful, that Kelley's name, along with other ''troublemakers'' had been discussed at management meetings, that Kelley should ''watch her back,'' and that management didn't forget. Knight, who succinctly and unconvincingly denied making such statements, did not impress me as a credible witness. Further, Knight made a similar statement to Kelley, whom I credit, when she told Kelley to be careful about what she said because ''they will use it against you.''

It is admitted that Kelley's extensive activity and involvement with the Union was widely known. Indeed, Labor Relations Director Gilbert Graham testified that because of Kelley's overt union activity, the determination to discharge her was a ''sensitive'' and carefully considered matter. He also testified that company policy did not dictate the mandatory discharge of an employee for the second infraction of improperly handling money, and that the appropriate discipline under the circumstances was entirely discretionary.

I conclude from the foregoing that the written warning given to Kelley on July 28 was discriminatorily motivated, as alleged, as it was the first written warning issued by the Respondent for similar types of infractions, and occurred following the period when Kelley had been discriminatorily denied hours as a rover, as found above. It is apparent that there was no standard policy for the issuance of such written warnings, and that verbal admonitions were considered to be sufficient. The Respondent has failed to provide a legitimate reason for such disparate treatment, and I find that the written warning was violative of Section 8(a)(1) of the Act.

I further find that the credible evidence demonstrates that Kelley was discharged because of her union activity. The policy infractions committed by Kelley, although serious, were not flagrant, uncommon, or harmful to the Respondent, and under such circumstances termination is admittedly discretionary rather than mandatory. Indeed, according to Store Manager Goodman, it was the Respondent's policy that the discharge of an employee should take place after three rather than two written warnings. The record shows that except for the two infractions, Kelley was considered to be a highly qualified employee; she was one of two acceptable candidates for the position of cash office manager, and in March she advised Store Manger Goodman that she was interested in a career with the Respondent. The Respondent has not proffered any convincing rationale for exercising its discretion in the manner it did. Moreover, as found above, former Manager Knight, in no uncertain terms, advised Kelley's friend, Rinehardt, that Kelley was considered by management to be a ''troublemaker'' and that Kelley should be careful and ''watch her back.'' I conclude from the foregoing that Kelley was discharged in violation of Section 8(a)(1) and (3) of the Act.

Kelley's ''peon'' remark to Manager Cheryl Knight was clearly an innocuous remark made spontaneously without any malicious intent. It constituted no more than everyday repartee among friends. Regardless of whether Knight, for some inexplicable reason, felt offended, it is clear that the Respondent overreacted by admonishing Kelley for making a remark that would not reasonably have offended a fellow employee who was stepping down from a managerial position. Perhaps it may have been appropriate for the Respondent to advise Kelley to be circumspect about what she said to Knight in view of Respondent's apparent knowledge that this was a highly sensitive subject with Knight. However, Kelley was not privy to Knight's perception of the matter; and the Respondent's subsequent admonishment of Kelley appears to confirm what Knight later told Kelley, namely that she should be careful about what she says because ''they will use it against you.'' I find that the admonishment of

[9] There is record evidence to the effect that it would be possible for someone to lean through the cash office window from the outside, and open the cash drawer located beneath the window, and remove the money. However, the likelihood of such an occurrence during times when the store is closed and cash has been inadvertently left in the drawer is extremely improbable.

[10] I discount Personnel Manager Hartmann's explanation that, while she had knowledge of this infraction by the sales associate, she did not deem it to be serious enough to warrant a written warning as the primary training and job of a sales associate on the selling floor is to sell and deal with customers; conversely, according to Hartmann, the primary training and responsibility of a cash office employee is to properly handle money. It is clear that both sales associates and cash office associates handle money and deal with customers, and that the proper handling of money in accordance with established procedure is necessarily a substantial part of the job of both categories of employees.

Kelley for the ''peon'' remark was discriminatorily motivated in violation of Section 8(a)(1) of the Act.

I find no merit in the General Counsel's contention that Raymond, rather than Thompson, should have received more hours of work. Both Thompson and Raymond were known to be active union adherents. Thompson was allocated more hours because she was the more senior employee, as Raymond's prior seniority was not reinstated after her break in employment.

I find no merit in the General Counsel's contention that Sue Wood, an active union adherent, was harassed by the Respondent in retaliation for her union activity. The fact that Division Manager Pam Rupert refused to sign her time discrepancy form on one occasion, without more, is insufficient to establish an unlawful motivation on the part of Rupert; further, this did not reflect adversely upon Wood. Regarding the sale of the child's coat to a customer, it is clear that Wood was told by her manager, MacKenzie, not to sell the coat at the sale price unless Wood had previously assured the customer that she would be given the sale price. Following this conversation with MacKenzie, it appears that Wood disregarded MacKenzie's instruction. I therefore find that the written warning given to Wood was not in retaliation for her union activity. Finally, the fact that Manager MacKenzie was attempting to discover who had written some vulgarity on a work list that MacKenzie had prepared for the employees' use and, in this regard, questioned Wood and another employee about whether they were responsible, appears to be no more than a legitimate prerogative of supervision to investigate matters of improper employee behavior.

There were four or five incidents involving the alleged discriminatory treatment of employee Kerry Kinville, known to be an active union adherent. On October 29, Kinville was unable to clock in on time as someone was using the cash register on which the employees were to clock in. Division Manager Pam Rupert refused to sign Kinville's time discrepancy form, which indicated that Kinville had arrived at work on time, as Rupert did not observe Kinville when she came in to work. Later, a different manager signed the form for Kinville. On the next day, Kinville had been out of her department as she had some business-related matters to take care of. As she was returning, Rupert asked her where she had been, and why she was not in her work area, as there was no one covering her department. She told Kinville to return to her department right away. Kinville did not receive a written warning for being away from her department. During monthly reviews in November and December, Kinville was told by her manager that she had been late twice during each review period. Finally, Kinville was not scheduled to work the Saturday after Thanksgiving by Manager Reni Rodriguez, although she customarily worked on Saturdays.

I conclude that the record evidence simply does not support the contention that the conduct of the aforementioned managers toward Kinville was motivated by her activity on behalf of the Union. There is no evidence that Kinville was singled out for such treatment, or that Rupert was attempting to fabricate some reason to give Kinville a reprimand, or that the Respondent was falsely accusing Kinville of being late in order to initiate some adverse action against her. Further, I credit the testimony of Manager Rodriguez and find that her failure to schedule Kinville for the Saturday after Thanksgiving was due to legitimate scheduling considerations, as Thanksgiving week posed unusual scheduling problems. The foregoing isolated and unrelated incidents occurred as much as 6 months following the election, at a time when no union activity was prevalent at the store. I find that these incidents, whether viewed singly or collectively, do not demonstrate any design by the Respondent to treat Kinville in a discriminatory manner. Moreover, the Respondent acknowledged that Kinville is considered to be a good employee, and the aforementioned matters have resulted in no warnings or unfavorable monthly evaluations.

It is clear that prior to the union organizational campaign the employees were permitted to use the lunchroom bulletin board for any legitimate purpose. They were not required to obtain permission from management to post appropriate notices, and their access to the bulletin board was not restricted in any manner. The Respondent abruptly changed this policy upon the advent of the Union, and thereafter the employees were no longer permitted to utilize the bulletin board for any purpose; and union-related material which employees had posted was conspicuously removed by management. Such conduct on the part of the Respondent which inhibits employees from posting union-related information in the lunchroom where it may be conveniently seen and read by all employees is clearly violative of Section 8(a)(1) of the Act. See *Liberty House Nursing Homes*, 236 NLRB 456, 461 (1978); *Connecticut Color, Inc.*, 288 NLRB 699, 704 (1988); *Stanley Furniture Co.*, 244 NLRB 589, 592 (1979); *Dawson Carbide Industries*, 273 NLRB 382, 386 (1984); *Springfield Jewish Nursing Home*, 292 NLRB 1266, 1275–1276 (1989).

The Respondent's announcement to the employees on March 28 that a new commission program would be implemented in May had clearly been in the planning stages long before the advent of the Union. It had previously been implemented at other Respondent's stores, including at least one store represented by the Union herein; and the Respondent's parent corporation required that it be placed in effect at all stores with a specified volume of business. Contrary to the position of the General Counsel, the record evidence does not demonstrate that the commission program was either announced or implemented in response to the union organizational campaign; rather it was simultaneously placed into effect at the Olympia store and other stores in accordance with predetermined valid business considerations.

In this regard, I do not credit the testimony of employee Thompson to the effect that Goodman told her that there would not be a commission program at a union store. In fact, the commission program was in effect at union stores. Moreover, although Goodman had private discussions with some 50 other employees regarding the new commission system, there is no evidence that Goodman made this alleged statement to any of them.

B. *The Election Objections*

The Union filed four distinct election objections. The first objection alleges as objectionable conduct the unfair labor practices alleged in the complaint which occurred between the date of the filing of the election petition and the date of the election.[11] I find merit to the Union's objection that Store Manager Goodman coercively interrogated employee Holly Kelley on March 7; that after the election petition was filed

[11] *Ideal Electric Co.*, 134 NLRB 1275 (1961).

the Respondent unlawfully discontinued its bulletin board policy and thereafter refused to permit the posting of union-related material and required that employees receive prior authorization to post any other type of material; and that beginning about March 16 and continuing throughout the preelection period and thereafter, the Respondent discriminatorily failed and refused to assign work as a rover to Kelley.

At the hearing the Union withdrew two of its election objections. The fourth, and final, election objection is as follows:

> On or about May 12, 1990, the Employer disseminated a memorandum in question-and-answer form which misstated and overstated the amount and method of collection of Union dues, fees, and assessments. Specifically, the document stated that the Union charges every new member an initiation fee, which is not the case; stated that the Union would charge an initiation fee for every re-hire who comes in (the Union does not charge an initiation fee if a re-hire has taken a withdrawal card); and stated that the Union may require contributionsto strike funds and other special assessments, without stating that all such contributions and assessments must be approved in advance by the membership.

It is clear that the foregoing objection must be dismissed, as alleged misrepresentation during the preelection period may not be used to set aside an election. In *Midland National Life Insurance*, 263 NLRB 127 (1982), the Board stated that:

> [W]e will no longer probe into the truth or falsity of the parties' campaign statements and . . . we will not set elections aside on the basis of misleading campaign statements.

See also *UARCO, Inc.*, 286 NLRB 55 (1987).

I conclude that the Respondent's aforementioned unfair labor practices which it committed following the filing of the representation petition herein on March 7, and which the Union included as timely filed election objections, are sufficient to establish that the Respondent has interfered with the employees' freedom of choice. Contrary to the contention of the Respondent, it is reasonable to conclude that the Respondent's unlawful conduct, which included the denial to all employees of the right to utilize the Respondent's bulletin board for the posting of union-related material, and the discriminatory denial of working hours to employee Kelley, a staunch and highly visible union advocate, affected the results of the election.[12] I shall therefore recommend that the election held on May 18 in Case 19–RC–12155 be set aside and that a second election be directed.

[12] Cf. *Clark Equipment Co.*, 278 NLRB 498, 505 (1986); *Metz Metallurgical Corp.*, 270 NLRB 889 (1984).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act by coercively interrogating employee Holly Kelley, by creating the impression that employees' union activity was under surveillance, by issuing a written warning to Kelley for failing to place the cash fund money in the vault, by reprimanding Kelley for making an apparently innocuous remark to then Manager Cheryl Knight, and by promulgating and enforcing an unlawful policy restricting the use of the lunchroom bulletin board in a manner which precluded the posting of union-related campaign material.
4. The Respondent has violated Section 8(a)(3) and (1) of the Act by failing to provide Kelley with sufficient hours as a rover subsequent to March 16, and by discharging Kelley on September 16.
5. By the various unfair labor practices found above, specifically those occurring following the filing of the petition herein on March 7 and extending through the date of the election on May 18, the Respondent has interfered with the freedom of choice of employees, and it is recommended that the election in Case 19–RC–12155 be set aside and that a second election be directed.
6. Except as found above, the Respondent has not engaged in the other unfair labor practices as alleged in the complaint, nor has it engaged in other objectionable conduct encompassed within the Union's election objections.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and in any other manner interfering with, restraining, or coercing their employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice attached hereto as an appendix.

Having found that the Respondent unlawfully failed to provide employee Holly Kelley with sufficient hours as a rover, and that it discharged her in violation of the Act, the Respondent shall be required to make Kelley whole for any loss of pay as a result of the discrimination against her, and reinstate her to her former position of employment without prejudice to her seniority or other rights and privileges. Said backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such backpay to be computed in accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]